86 1481

NO.

SUPREME COURT OF THE UNITED STATES

LAWRENCE M. HOLLOWAY and
ROENA J. HOLLOWAY,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent,

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. WHETHER "DUE COURSE" IN AN OFFER IN COMPROMISE IS TO BE DETERMINED BY THE "REGULAR PRACTICE AND PROCEDURE OF THE GOVERNMENT" RATHER THAN STANDARD CONTRACT LAW WHERE THE RESULT IS A SEVEN AND ONE-HALF (7-1/2) YEAR DELAY BETWEEN THE OFFER BEING SUBMITTED AND REJECTED?

2. WHETHER THE GOVERNMENT'S FAILURE TO PROCEED IN DUE COURSE IS THE EQUIVALENT OF REJECTING THE OFFER IN COMPROMISE, THE STATUTE OF LIMITATIONS THEREBY RUNNING?

3. WHETHER THE TAXPAYERS ESTABLISHED A PRIMA FACIE CASE OF THE GOVERNMENT'S FAILURE TO CONSIDER THEIR OFFER IN COMPROMISE IN DUE COURSE OR IN ACCORDANCE WITH THE REGULAR PRACTICE AND PROCEDURE OF THE IRS WHEN THE OFFER COULD NOT EVEN

BE CONSIDERED NOR ACTED UPON AS IT WAS NOT PROPERLY EXECUTED PER THE IRS' OWN RULES AND REGULATIONS?

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REPORTS OF OPINIONS BELOW

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) United States Court of Appeals Opinion No. 85-1128 decided and filed August 18, 1986. 28 U.S.C.

1254(1).

(ii) United States Court of Appeals Order denying Defendants/ Appellants' Petition for Rehearing filed September 15, 1986.

(iv) A federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. USC Rule 17.1(c).

REGULATIONS WHICH THE CASE INVOLVES

Internal Revenue Regulation Sec. 601.203(a)

See page 20 of Argument

Internal Revenue Regulation Sec. 301.7122-1

See Page 20 of Argument

2 Administration, CCH Internal Revenue Manual, para.'s 57(10)7.2, 57(10)(21).1, 57(10)2.1, 57(10)2.27, 57(10)3.1, 57(10)3.2, 57(10)6.32 and 6.331, 57(10)7.1, 57(10)7.51, 57(10)7.521 and 7.522, and 57(10)(23).73

See Pages 14-16; 21-32 of Argument

STATEMENT OF CASE

The Tax Court of the United States on October 21, 1964, determined there were deficiencies in the income and taxes and additions to taxes due from the Holloways in the amount of Ninety Thousand Four Hundred Eighty-Four Dollars and SeventySeven Cents ($90,484.77) and with interest the total assessment equaled One Hundred Twenty-Seven Thousand Thirty-Seven Dollars and Twenty-Eight Cents ($127,037.28).

An Offer In Compromise was submitted on June 10, 1965 for settlement of the total tax liability of the Holloways, which Offer was accepted by the IRS for consideration and processing on June 18, 1965.

That the Offer In Compromise on the form required to be used by the U.S.

Government was signed by both Defendants/ Appellants, however, the Statement of Financial Condition and Other Information on Form 433 that is required to be submitted with an Offer In Compromise was only executed by Lawrence M. Holloway. A copy of the Offer and the Statement of Financial Condition is lodged with the Court Clerk.

On February 3, 1966, the Internal Revenue Service assigned the Offer in Compromise to special agents to investigate whether the Offer was submitted with criminal intent and contained criminally fraudulent statements.

On October 18, 1968, by notice from Regional Counsel's office, the case was referred to the Department of Justice for criminal proceedings to be instituted against the Holloways because of the

filing of a fraudulent Offer In Compromise and Financial Statement.

On May 20, 1970 the U.S. Government indicted in Count I both Defendants/Appellants for knowingly and willfully filing a false Statement of Financial condition and Other Information and charged that Lawrence Holloway claimed the ownership of assets having a fair market value of Four Thousand Four Hundred Dollars ($4,400.00) when he in fact had, and knew he had, additional assets having a fair market value of Twenty-Four Thousand Four Hundred Twenty-Six Dollars and Thirty Cents ($24,426.30).

The indictment of the Defendants/Appellants was dismissed by the United States District Judge Steven J. Roth on December 16, 1971, wherein the Court held that the pre-indictment delay by the gov-

ernment, under the circumstances of this case, seriously impaired the Defendants' ability to present a defense. A copy of the Order of Judge Roth is attached hereto in the Appendix page 55.

The Government's appeal from the dismissal of the indictment was dismissed on February 21, 1972.

On June 12, 1972, the Internal Revenue Service wrote to the Defendants indicating the IRS could not proceed on the Offer In Compromise until form 433 from Lawrence M. and Roena J. Holloway was updated and delivered to them.

On February 13, 1973, the Internal Revenue Service mailed a letter to the Holloways notifying them that their Offer In Compromise was rejected for the reasons that (1) the Defendants had not furnished the necessary information for a

field examiner to determine the merits of the Offer, and (2) the incomplete investigation of the Offer showed that the amount appeared to be less than that which could be collected. That the necessary financial information had not been furnished was clear upon submission of the Offer in 1965 because Mrs. Holloway had never signed the financial information form in the first instance.

On September 30, 1976, the Government filed this action in the District Court to reduce the 1964 tax assessments to a Judgment in the amount of One Hundred Eighty-Nine Thousand Seven Hundred SixtyFour Dollars and Thirty-Seven Cents ($189,764.37) plus interest from June 1, 1976.

Both parties thereafter filed Motions for Summary Judgment which the

District Court denied in a written opinion dated May 12, 1980. The Honorable Stewart A. Newblatt was persuaded that a genuine issue existed as to whether or not the Government proceeded in due course in considering the Offer In Compromise, as required by the contract, and set the matter for an Evidentiary Hearing. A copy of the Opinion is attached hereto in the Appendix page 46.

The Evidentiary Hearing was held on July 23, 1980.

On the Government's renewed Motion for Summary Judgment, the District Court granted its Motion For Summary Judgment in a written opinion dated January 11, 1985. A copy of the Opinion and Order is attached hereto in the Appendix page 39. Judgment was entered on the same date, a copy of which is attached in the Appendix

page 62.

The District Court's decision was appealed to the United States Court of Appeals for the Sixth Circuit on or about February 6, 1985. Oral Arguments were heard on July 25, 1986 and the Court's Opinion affirming the District Court's Judgment was decided and filed on August 18, 1986. Holloways filed a Petition and Brief for Rehearing on September 2, 1986, which was denied by Order of the Court dated September 15, 1986, a copy of which Order is attached in the Appendix page 64.

ARGUMENT

Issue One
Issue Two

The contractual language contained in the Offer, drafted by the Government and therefore strictly construed against them, states as follows: "...this offer will be considered and acted upon in due course," during which time period the taxpayer agrees to the suspension of the statute of limitation waiving any benefit during the period. The Government relies on the case of U.S. v Cooper-Smith, 310 F.Supp.479 (ED NY, 1970), aff'd 439 F.2d. 1095 (CA 2, 1971) in arguing that "due course" depends on the regular practice and procedure of the Government. The Government is contending that regular practice and procedure allows for a seven and one-half (7-1/2) year delay between

the Offer being submitted and rejected in writing.

Petitioners argue that the six-year statute of limitations which was tolled by their offer of compromise began to run again when the Internal Revenue Service referred the matter to the Department of Justice for possible criminal proceedings. Petitioners further argue that this was an implied rejection of the offer of compromise and that no withdrawal by them or formal rejection by the IRS was necessary to start the statute of limitations running again.

The Internal Revenue Manual itself makes clear that the Offer is to be construed according to contract law, as follows:

> 57(10)7.2
> PUBLIC POLICY

(1) An accepted offer, like any contract, is an agreement between two parties resulting from a 'meeting of the minds'. The Service...represents the government's interest in the negotiations...(Emphasis Added) 2 Administration, CCH Internal Revenue Manual, para. 57(10)7.2 Special Procedures at 7339.

57(10)(21)
Rescission of Accepted Offers

57(10)(21).1
General

(1) A compromise is a contract which is binding and conclusive on both the Government and the proponent and precludes further inquiry into the matters to which it relates. In the absence of fraud or a mutual mistake, the courts have consistently denied either party recovery of any part of the consideration given with a settlement when it was properly rendered under a compromise agreement. However, an offer in compromise which has been accepted under a mutual mistake as to a material fact, or because of the false representations made by one party about a material fact, may be rescinded or set aside. The meaning, validity and consideration of such a contract is subject to interpretation by a

court. (Emphasis Added) 2 Administration CCH Internal Revenue Manual, para. 57(10)(21).1, Special Procedures, at 7379.

Under general contract law, if no time is fixed in the offer within which acceptance must be made, it is a general rule that acceptance must be within a reasonable time. 1 Williston On Contracts Sec. 54, pp 172-173 (3rd. ed.); Rubsam v Harley C. Loney Co., 117 F. Supp. 164, aff'd 217 F.2d.353, cert denied 76 S. Ct. 69, 350 U.S. 833, 100 L.Ed. 744, rehearing denied 76 S.Ct. 149, 350 U.S. 898, 100 L.Ed. 789. Where ambiguous language is used in limiting the time for acceptance, i.e., "in due course", its meaning should be determined by what the taxpayers reasonably understood the Government to have intended. See The Law of Contracts, Simpson, Sec.

20, pp 24-25 (2d.ed., 1965).

In the case at bar, seven and one half years is clearly not reasonable, nor could it be argued the taxpayers reasonably understood that "in due course" meant such an excessive length of time.

Further, under general contract law, the power of acceptance is terminated by illegality supervening between the making of an offer and its acceptance. The Law of Contracts, Calamari and Perillo, Sec. 33, p 61 (1st. ed., 1970); Restatement, Contracts Sec. 50. The Michigan Supreme Court in Krause v Boraks, 341 Mich 149, 155 (1954) further held as follows:

> All contracts which are founded on an act prohibited by a statute under a penalty are void although not expressly declared to be so and neither law nor equity will enforce a contract made in violation of such a statute or one that is in violation of public policy. Jaenicke v Davidson, 290 Mich 298.

It is therefore clearly arguable, under basic contract law, that the offer was rejected when the case was referred to the Department of Justice for criminal proceedings to be instituted against Appellants on October 18, 1968, because of the filing of an alleged fraudulent Offer In Compromise and Financial Statement.

Petitioners disagree with the analysis of the Sixth and Fifth Circuits in their adoption of the reasoning of the Ressler court in United States v Ressler, 576 F.2d. 650, 652-53 (5th Cir. 1978), in that such reasoning places the entire burden on the taxpayer to withdraw his Offer after indictment or an unreasonable length of time while placing no responsability on the government to act reason-

ably allowing abuses under the guise of their "regular practices and procedures" which is clearly inconsistent with basic contract law and the government's alleged position that the Offer in Compromise is a contract.

Issue Three

The Offer together with Form 433 executed only by Lawrence Holloway were submitted by Taxpayers on June 10, 1965 and accepted for consideration or processing by the IRS on June 18, 1965. The IRS' acceptance of this non-processable Offer and their failure to immediately return the Offer to the taxpayers for completion while accepting the benefits of the taxpayers' waiver of the Statute of Limitations was clearly not in accordance with their regular practices or procedures which is the definition

adopted for acting in "due course" by the Sixth Circuit Court herein and the Second Circuit in United States v Cooper-Smith, 310 F.Supp. 479, 482(E.D. N.Y. 1970), aff'd, 439 F.2d 1095 (2nd Cir. 1971).

Internal Revenue Regulation Sec. 601.203(a) states that Offers in Compromise must be submitted on Form 656 "properly executed and accompanied by a financial statement on Form 433", and Regulation Sec. 301.7122-1 requires that IRS' forms be used and further states as follows in Sec. 4.02:

> Sec.4. GENERAL GUIDELINES RELATING TO THE ACCEPTABILITY OF AN OFFER IN COMPROMISE... .02 A Statement of Financial Condition and Other Information, Form 433, signed by the taxpayer, is required in all offer in compromise cases based on the taxpayer's inability to pay the total amount due, regardless of the type of tax or amount of liability involved. (Emphasis added)

Further, under the regular practices and procedures of the Government, the offer, if accepted, is an agreement to be interpreted under the law of contracts i.e., the offer must be definite in its terms and conditions, therefore, where there is a significant error or omission in the offer, the offer cannot be accepted and the waiver acceptance should not be completed by the IRS until the offer is processable as the Internal Revenue manual makes clear:

> 57(10)2
> Preparation of the Offer (Form 656)
>
> 57(10)2.1
> General
>
> (1) The offer in compromise is the taxpayer's written proposal to the Government and, if accepted, is an agreement enforceable by either party under the law of contracts. Therefore, it must be definite in its terms and conditions.

(2) All offers in compromise must be submitted on Form 656. The taxpayer submitting the offer will complete all relevant items on the forms and file the original and one copy with the service center serving the district office where the taxpayer's liability is or would be outstanding, regardless of where the taxpayer legally resides or has its principal place of business. See Exhibit 5700-19.

(a) Whenever an offer is submitted to a district office, the receiving employee should review the offer to ensure its adequacy, for further processing. If there are significant errors or omissions, such as: illegal identification of liability, no amount offered, lack of signature, Form 433 missing, etc., the receiving district office employee will return the offer to the proponent with a note specifying what must be corrected or added before offer processing can begin. The waiver acceptance should not be completed until a processable offer is received. Exhibit 5700-19 presents a checklist which may be used as a guide to determine if Form 656 has been prepared correctly. When a processable offer is received from the proponent, the receiving employee should complete

acceptance of the waiver of statutory period by signing or securing the signature of an appropriate delegated official in the lower left corner of Form 656 and promptly forward it to the service center.

(b) The taxpayer may correct the offer by either:

1 entering and initialing the changes on the Form 656 submitted, or

2 filing a new Form 656.

(3) Form 433, Statement of Financial Condition and Other Information, must accompany Form 656 when an offer is based wholly or partly upon doubt as to collectibility. (Emphasis added) 2 Administration, CCH Internal Revenue Manual, para, 57(10)2.1 at 7331.

Attached hereto in the Appendix page 65, is the form 656 Checklist referred to above which makes clear Form 433 must be attached to the Offer in this case.

The following IRS Manual provisions further substantiate that a "complete"

Form 433, i.e., signed by both taxpayers in this case, must be submitted or the offer must be corrected or rejected by the IRS immediately as insufficient for processing:

> 57(10)2.27
> Grounds For Offer
>
> Item 7 of Form 656 is to be used for giving the facts and reasons why the offer in compromise should be accepted. If the offer is based only on doubt as to collectibility, it is only necessary to state, 'I cannot pay these taxes,' since a financial statement must accompany the offer. (Emphasis added) 2 Administration, CCH Internal Revenue Manual, para. 57(10)2.27 Special Procedures at 733.3.
>
> 57(10)3
> Preparing the Financial Statement
>
> 57(10)3.1
> Prescribed Form
>
> (1) A taxpayer seeking to compromise a tax liability based on doubt as to collectibility must submit Form 433, Statement of Financial Condition and Other Information.

(2) All items on Form 433 must be completed. To avoid any misunderstanding, enter "none", "N/A", "not applicable", or other similar entry for those items that do not apply to a particular taxpayer.

(3) If the taxpayer submits additional documents or other financial statements to supplement Form 433, they must be clearly referenced on Form 656 and conclude with the taxpayer's signed declaration under penalties of perjury.

57(10)3.2
Refusal to Submit Financial Statement

If a taxpayer professing inability to pay on Form 656 does not submit the required Form 433, the offer will be immediately returned to the taxpayer. As the Service cannot begin to determine whether the amount offered is also the maximum amount collectible, the offer will be considered as insufficient for processing. (Emphasis added) 2 Administration, CCH Internal Revenue Manual, paras. 57(10)3.1 and 3.2, Collection Activity at 7334.

As the Manual specifically addresses, the IRS' own procedures require the IRS to act promptly on all offers and summarily reject those which do not include a complete Form 433 when based on inability to pay:

> 57(10)6.32
> Transcript of Tax Accounts
>
> (1) In order that the district office may act promptly on all offers in compromise, the service center sends the offer file without computer transcripts of account. Transcripts will be forwarded to the district by the requesting service center upon receipt from the National Computer Center...(Emphasis added)
>
> * * *
>
> 57(10)6.331
> Special Procedures Function Action
>
> (1) All offers (except those under jurisdiction of the district Examination function) will be forwarded to SPf from the service center...

(2) SPf will take the following actions:

(a) Review the offer file for completeness...

(3) All remaining offers will be subject to initial review in SPf prior to assignment for field investigation. SPf may recommend summary rejection of any offer determined to be frivolous, intended to delay collection, a potential fraud case, where there is no basis for compromise, or the taxpayer refuses to submit a complete Form 433 (See IRM 57(10)7.1) (Emphasis added) 2 Administration, CCH Internal Revenue Manual, paras. 57(10)6.32 and 67.331, Special Procedures at 7337.

57(10)7
Investigation of Offers

57(10)7.1
General

(1) Once an offer in compromise is received in Special Procedures function, a determination whether the offer merits further consideration must be made. SPf should use all information contained in the offer file and may consult with the revenue officer assigned the TDAs to obtain additional financial informa-

tion or verify existing information.

(2) Summary rejection in SPf can be made on the grounds that the offer is frivolous, was filed merely to delay collection, or where there is no basis for compromise. Although not all inclusive, the following list provides guidelines on the criteria for summary rejection most often encountered:...

(d) The taxpayer refuses to submit a complete financial statement (Form 433)...

(3) When SPf determines that the offer should be summarily rejected, the procedures in IRM 57(10)(13).2(4) will be followed in preparing Form 1271, Rejection or Withdrawal Memorandum...

(5) Since an initial review of the offer in compromise has been made by SPf (paragraph (2) above), an offer received by the field examining officer will, in most cases, merit further consideration. Form 656, Form 433, if it applies, and all related documents should be reviewed to determine a course of action and a basis for an acceptable offer prior to meeting with the taxpayer. (Emphasis added) 2 Administra-

tion, CCH Internal Revenue Manual, para. 57(10)7.1, Special Procedures at 7339.

57(10)7.51
Determination of Adequate Offer

* * *

(2) The investigation of offers based on inability to pay requires comprehensive analysis by the examining officer to ascertain the taxpayers ability to pay:...(Emphasis added) 2 Administration, CCH Internal Revenue Manual, para. 57(10)7.51, Collection Activity at 7342.

57(10)7.521
Special Procedures Function Investigation

(1) All offers with total tax liability below $10,000 initially will be assigned to SPf for investigation...information contained on Form 433-A and verified by a revenue officer would normally be sufficient for offer in compromise purposes (tax liability under $10,000), if it appears that the taxpayer's financial condition has not changed appreciably.

* * *

(4) Since Form 433 will be the primary source of financial information for this examination; offer investigations should be completed as soon as possible to ensure that the financial statement reflects the taxpayer's current financial condition. Before recommending acceptance, the examining officers will review the taxpayer's latest income tax return to verify that the assets and liabilities listed on Form 433 are complete and accurate.

* * *

57(10)7.522
Field Investigation

(1) Offers with total tax liabilities $10,000 or more will be assigned to the field examining officer. Before arranging an appointment with the taxpayer for a thorough examination of the offer, the field examining officer should make a comprehensive review of the offer, the financial statement and all other information in the file...Assets or liabilities appearing on a financial statement or other record supplied by the taxpayer should be verified in writing or in person by the examining officer.

* * *

(5) Offer investigations should be completed as promptly as possible. Before an offer is recommended for acceptance, the examining official will review the taxpayer's latest income tax return (1040, 1120, etc.) for any assets or sources of income not listed on the Form 433.

* * *

(7) The taxpayer's financial statement should be verified to ensure that it reflects the current financial position of the taxpayer. Courtesy investigations should be initiated whenever necessary to verify information. An updated Form 433 will not be necessary during the offer examination... (Emphasis added) 2 Administration, CCH Internal Revenue Manual, paras. 57(10)7.521 and 7.522, Special Procedures at 7343-7345.

It is interesting to note that under the IRS Manual procedural rules, even a proposal to compromise the balance of an accepted offer, when based on doubt as to

collectibility, must be submitted with a complete Form 433 even though no offer form (such as Form 656) is prescribed for use in submitting such a proposal. See 2 Administration, CCH IRS Manual, para. 57(10)(23).73, Collection Activity, at 7388.

Attached hereto in the Appendix pages 70 and 73, are sample rejection letters contained in the IRS Manual which support Petitioners position that the Offer herein should have been immediately rejected by letter as not containing sufficient information to enable the IRS to determine its adequacy as it was not legally acceptable as submitted.

Finally, under general contract law and according to the Michigan Supreme Court in Bitulithic Paving Co. v Highland Park, 164 Mich 223, 228 (1910):

> ...But a contract is not made so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations. The law does not make a contract when the parties intend none, nor does it regard an arrangement as completed which the parties thereto regard as incomplete.

The IRS in the case at bar accepted and received the benefit of the waiver of the statute knowing full well the offer as submitted was not processable as containing a significant omission i.e., Mrs. Holloway's signature on Form 433, which was clearly in violation of their own procedural mandates and not in accordance with regular practice. The IRS did not act in due course as that term is defined by the Sixth Circuit and the caselaw below.

WHEREFORE, Petitioners Lawrence M. and Roena J. Holloway pray this Honorable

Court grant this Petition for Certiorari as Taxpayers' Offer In Compromise was not acted upon in "due course" or in accordance with the regular practice and procedure of the IRS.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1128

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE M. HOLLOWAY; ROENA J. HOLLOWAY,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 18, 1986

Before: LIVELY, Chief Judge; KENNEDY and MILBURN, Circuit Judges.

PER CURIAM. The defendants, husband and wife, appeal from an order of the district court granting summary judgment to the United States and reducing to judgment certain income tax assessments. The Tax Court determined deficiencies in the defendants' income tax returns for the years 1950 to 1957 and 1960. This determination was made on October 30, 1964. On June 18, 1965 the defendants submitted an offer in compromise, which both of them signed, to satisfy all outstanding liabilities. A statement of financial condition, signed only by Lawrence M. Holloway, was submitted with the offer and showed his total assets to be about $4,400 and his liabili-

ties at approximately $240,000. The printed offer of compromise form contained the following provision:

> The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or of the period during which any installment remains unpaid, and for 1 year thereafter.

On February 3, 1966 the Internal Revenue Service (IRS) assigned the defendants' offer to special agents for investigation of possible fraud and on October 18, 1968 the matter was referred to the Department of Justice for consideration of instituting criminal proceedings. The taxpayers were indicted on May 20, 1970 for knowingly and willfully filing a false statement of financial condition and other information. The district court dismissed these charges for preindictment delay and thereafter the defendants' offer of compromise was returned to the IRS collection division. On June 12, 1972 the IRS notified the defendants that the offer could not be processed until an updated statement of financial condition was received. When the defendants failed to provide further information the IRS formally rejected the offer of compromise on February 14, 1973. On September 20, 1976 the government filed this action to reduce to judgment the original 1964 tax assessments. Following an evidentiary hearing the district court determined that the government had proceeded in due course in considering the defendants' 1965 offer and granted summary judgment for the United States.

The issue on appeal is whether the government filed this action within the limitations period. In *United States v. Ressler*, 576 F.2d 650, 652 (5th Cir. 1978), the court stated:

> The running of the statutory period is suspended until the offer of compromise is terminated, with-

> drawn, or formally rejected. *See Myrick v. United States*, 296 F.2d 312 (5th Cir. 1961). In addition, it is suspended for one additional year, as provided by the terms of the offer.

The defendants argue that the six-year statute of limitations which was tolled by their offer of compromise began to run again when the Internal Revenue Service referred the matter to the Department of Justice for possible criminal proceedings. They argue that this was an implied rejection of the offer of compromise and that no withdrawal by them or formal rejection by the IRS was necessary to start the statute of limitations running again. The *Ressler* court dealt with this argument as well, stating:

> We find no reason why proceedings in a criminal matter should have any effect on whether even a related civil matter can be compromised. There is nothing necessarily inconsistent from the Government's standpoint in prosecuting for fraud and still considering an offer of compromise of the civil liability for tax. A prosecuted taxpayer is not left unprotected: if he thinks that his prosecution is inconsistent with the acceptance of his offer of compromise, he can withdraw the offer upon notice to the Government, and thus terminate the toll on the statute of limitation.

Id. at 652-53.

We agree with the analysis of the Fifth Circuit and adopt the reasoning of *Ressler*. Thus, the running of the statute of limitations did not begin until the IRS formally rejected the offer of compromise, which the defendants had never withdrawn.

The defendants also argue that the district court erred in finding that the IRS considered their offer of compromise in due course. As the court held in *United States v. Cooper-Smith*, 310 F. Supp. 479, 482 (E.D. N.Y. 1970), *aff'd*, 439

F.2d 1095 (2d Cir. 1971), " 'Due course' depends on the regular practice and procedure of the Government." The defendants had the burden of demonstrating that their offer of compromise was not acted upon in accordance with the regular practice and procedure of the IRS in order to prevail on this contention. They made no showing to support such a finding.

The judgment of the district court is affirmed.

APPENDIX B

United States District Court for the Eastern District of Michigan, Southern Division, Flint

No: 76-72023

UNITED STATES OF AMERICA, Plaintiff

v

LAWRENCE M. and ROENA J. HOLLOWAY, Defendants

MEMORANDUM OPINION AND ORDER

Plaintiff failed this action on September 30, 1976, to reduce a tax assessment to judgment. Both parties thereafter filed Motions for Summary Judgment which the Court denied in a written opinion dated May 12, 1980. Before the Court is plaintiff's renewed motion for summary judgment. The only issue which must be adjudicated is whether plaintiff processed defendants' offer of compromise in due course. If

plaintiff did so, the limitations period would be tolled and summary judgment on behalf of the plaintiff would be appropriate. If not, then plaintiff effectively rejected the offer at some point prior to the February 1973 official rejection thereby creating the possibility that some or all of its claims are timebarred. (See p 3 of this Court's May 12, 1980 opinion.) If such is found to be the case, plaintiff's renewed motion must be denied.

ANALYSIS

As was the case at the time of the Court's 1980 opinion, there is but one reported case dealing with the "due course" language of an offer to compromise a tax liability. In U.S. v Cooper-Smith, 310 F Supp 479 (ED NY, 1970) aff'd 439 F2d 1095 (CA 2, 1971), the Court in

defining "due course" stated:

> "Due course" depends upon the regular practice and procedure of the Government. There is no showing here that this offer was not considered and acted upon in accordance with the Government's regular practice and procedure in cases of this kind. Moreover, it would appear that in order to sustain the defendant's argument, some prejudicial connection would have to be shown between the alleged default and the enforcement of the waiver provision.

Id at 482.

In the instant case, defendants submitted their offer in compromise on July 18, 1965. In February, 1966, the offer in compromise was referred to the Intelligence Division because of the possible existence of criminally fraudulent statements. The criminal aspect of the case continued until the February 21, 1972 dismissal of the appeal taken from the

trial court's decision dismissing the indictment. Subsequently, the offer was fully considered and officially rejected on February 14, 1973. Since the offer was held in abeyance during the 6-year pendency of the criminal action, plaintiff took only about 1 1/2 years to actually consider the offer. Given the time needed to update the offer following the close of the criminal action and the press of other matters the review seems to have been accomplished in "due course."

As to holding the offer in abeyance pending the criminal action, it must be noted that since this was done in accordance with established procedure, it must therefore have been done in "due course."[1] The criminal investigation

1 Relying on US v Ressler, 576 F2d 650 (CA 5, 1978), defendants argue that the compromise of the civil matter should not

also was accomplished in "due course." While it is true that the fieldwork took over two years, the work was done in accordance with a set procedure in which cases were given priority in accordance with their respective statute of limitations date. Since the delay was caused by an established procedure developed because of manpower shortages in the field office, the two-year investigation must be considered to have proceeded in "due course."

The same can be said for the two-year delay produced by a procedure iden-

---

have been held in abeyance since it would not have been affected by the outcome of the criminal investigation. Defendants conclude that a sanction could not, therefore, have been performed in "due course." This argument misses the mark. First, it ignores the Cooper-Smith definition of "due course." Second, its underlying premise is mistaken. Surely, fraudulent statements concerning the value of the taxpayer's assets may affect the decision to accept or reject the offer in compromise.

tical to that used by the IRS field office in handing down the indictment once the matter was referred to the Department of Justice. As Willard McBride, an attorney for the Criminal Section of the tax Division of the Department of Justice testified, cases were given priority according to the statute of limitations date. Since the statute in defendants' case would not run for some time, it was given a low priority, hence the two-year delay. The remainder of the criminal action took only two years to complete and thus there appears to be no "due course" issue present for this period of time.

Clearly then, although it took plaintiff a considerable time to review and ultimately reject defendants' offer in compromise, plaintiff nevertheless

proceeded in "due course." Since the first prong of the Cooper-Smith test is not met, the Court will not consider whether the delay resulted in prejudice to the defendants. In light of the evidence produced at the evidentiary hearing it is clear that no genuine issues of fact exist in the present action and that plaintiff is entitled to judgment as a matter of law. Summary judgment must therefore be granted to the plaintiff.

CONCLUSION

For the reasons set forth above, plaintiffs motion for summary judgment is hereby granted. Judgment shall be entered accordingly.

IT IS SO ORDERED.

Dated: 1/11/85 /s/STEWART A. NEWBLATT
United States District Judge

APPENDIX C

United States District Court for the Eastern District of Michigan, Southern Division

No: 76-72023

UNITED STATES OF AMERICA, Plaintiff,

v

LAWRENCE M. and ROENA J. HOLLOWAY,

Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan, on May 12, 1980.

PRESENT: HON STEWART A NEWBLATT
United States District Judge

Plaintiff filed this action on September 30, 1976, to reduce a tax

assessment to judgment. Defendant raises the Statute of Limitations as a defense. Both parties have filed Motions for Summary Judgment.

On October 30, 1964, the Tax Court assessed income taxes for Defendants for the years 1950-57 and 1960-62. On June 18, 1965, Defendants submitted an offer of compromise to the Internal Revenue Service (I.R.S.). On February 3, 1966, a special agent of tne I.R.S. began investigating the possibility that the offer contained fraudulent statements. On June 18, 1968, the case was referred to the Justice Department because of the suspected fraud. An indictment was handed down on May 20, 1970, and dismissed on December 16, 1971. The U.S. appealed the dismissal, which appeal was itself dismissed on February 21, 1972.

By letter dated February 14, 1973, the offer was formally rejected.

Both parties agree that the applicable period of the Statute of Limitations is six (6) years. The parties further agree that the Statute is tolled while the I.R.S. considers an offer of compromise plus one additional year, a period that began in this case on June 18, 1965. The government argues that the tolling ends when the offer is specifically rejected. Alternatively, the government suggests that even if one were to agree with the holding of Coy v U.S., 377 F 2d 925 (9th Cir 1967), the offer would remain open until indictment. In either event, the complaint would have been timely filed, the limitations period having expired on June 25, 1979 under the first theory and on October 1, 1976 under

the latter.

Defendants maintain that the tolling period ended when the matter was referred to the Justice Department. It is on this theory that Defendants base their Motion for Summary Judgment. Alternatively, Defendants argue that Summary Judgment in favor of Plaintiff is not appropriate, as there are unresolved factual issues.

There is no case law to support Defendants' contention that the offer was rejected when the question of fraudulent statements in the offer of compromise was referred to the Justice Department. In Coy, supra, the Court held that when statements made in an offer of compromise lead to an indictment for fraud, the offer is deemed rejected at least on the day of sentencing, and possibly on the day of indictment. The Court reasoned

that the government could not ethically proceed on an offer based on fraud, and thus the offer was deemed rejected once fraud was established. That theory, though well reasoned, does not benefit Defendants here, as the complaint was filed one day prior to the expiration of the Statute of Limitations as established thereby. See also, U.S. v. Cooper-Smith, 310 F Supp 779 (ED NY, 1970) aff'd with opinion, 439 F 2d 1095 (2d Cir 1971) (offer not rejected until taxpayer officially notified of the same, despite full payment of offer of compromise); U.S. v. Ressler, 576 F 2d 650 (5th Cir 1978) (Criminal charge is separate from civil complaint, and therefore filing of indictment does not mean rejection of offer).

As stated above, Defendants assert

alternatively, that Summary Judgment is not appropriate, due to the existence of factual disputes. Of those alleged, the Court is persuaded that a genuine issue exists as to whether or not the government proceeded in due course in considering the offer of compromise, as required by the contract.[2] Although the government argues that such a finding is not relevant, this Court agrees with Defendants' contention that failure to proceed in due course would, at some point, be the equivalent of rejecting the offer in compromise. Such a concept is basic contract law, and the Court can think of no reason the principle should not apply here. This Court is aware of no statute,

2 Paragraph 7 of the offer in compromise, signed by both parties, states in relevant part: "It is understood that this offer will be considered and acted upon in due course..." See, exhibit C attached to Affidavit of John DiCicco.

regulation, or policy consideration which would mandate that an offer of compromise remains valid indefinitely regardless of how much time passed. In fact, in a case cited by the government, U.S. v. Cooper-Smith, supra, id, the lower Court noted that if the Defendants made a prima facie case of lack of diligence and showed some prejudice, they had raised a valid defense to the collection attempt. The passage of eleven (11) years from the offer of compromise to the filing of the complaint is in the opinion of this Court, a sufficient prima facie case. It takes little imagination to believe Defendants may have be prejudiced by such a delay.

The record is insufficient, however, to dismiss the claim because of the delay. Therefore, the matter is set for

an evidentiary hearing on the 13th day of June, 1980, at 3:30 P.M. In light of the fact that the delay appears to have been caused by the government, that the reasons for the delay are better known to the government than to the Defendants, and the record already established a prima facie case in favor of Defendants, it is the Court's present opinion that the burden should rest with the government to show that the delay was reasonable. Once that was established, Defendants would have the burden as to prejudice. Counsel may submit any motions, briefs or other material they wish the Court to consider by June 6, 1980.

For the above reasons, Defendants' Motion for Summary Judgment is also denied, but without prejudice and may be raised again following the above

scheduled hearing.

IT IS SO ORDERED.

Dated: 5/12/80 /s/ STEWART A. NEWBLATT
United States District
Judge

APPENDIX E

United States District Court for the Eastern District of Michigan, Southern Division, Flint

Criminal Action No: 44984

UNITED STATES OF AMERICA, Plaintiff,

v.

LAWRENCE M. and ROENA J. HOLLOWAY, Defendants.

The defendants in this case are charged in the indictment with violation of Section 7206(1), Title 26, United States Code, in two counts. In the first count the two defendants are charged with having submitted a false Offer in Compromise to pay back income taxes; in the second count the defendant Lawrence M. Holloway is charged with having submitted a false statement of Financial Condition and Other Information.

Defendants have moved to dismiss the

indictment. We consider the motion against the chronological history of the defendants' income tax involvement with the government.

The defendant Lawrence M. Holloway was indicted by the government in 1961 for income tax evasion. He pleaded guilty and was placed on two years probation and fined $10,000.00. Thereafter, civil proceedings were instituted by the government to collect back taxes and interest. These latter proceedings culminated in a decision of liability for more than one hundred twenty-five thousand dollars. Holloway was at that time deeply involved in the affairs of the Owosso Finance Company, which went under and was sold at a great loss in 1964. For many years Holloway's attorney was Mr. Francis George of Flint, Michigan.

During Holloway's struggles to save his finance company, he fired a manager for mismanagement and replaced him with Mr. Roland A. Bourdon. Beginning some time in 1965 the taxpayer and the government attempted to work out some kind of settlement on the tax liability, as it was obvious to both that he was in fact unable to pay the full assessment. In June 1965, the currently involved Offer in Compromise and Statement of Financial Condition and Information were filed, the defendants offering to pay ten thousand dollars in settlement. It was upon these documents that this prosecution was instituted.

The vital issue with respect to both documents is whether there was in fact falsification by the defendants of their financial condition and the defendant

Lawrence Holloway's physical condition; the government charging that, whereas Lawrence Holloway claimed the ownership of assets having a fair market value of $4,400.00, he in fact had, and knew he had, additional assets having a fair market value of $24,426.30.

From Lawrence Holloway's affidavit it is clear that he claims that some $23,000.00 of the difference between his and the government views concerning the extent of his assets could have been explained by his long-time attorney, Mr. George, and by the finance company manager, Mr. Roland A. Bourdon; and that, were their testimony now available to him, he could establish that the alleged and disputed assets were not his but belonged to his wife, his children and to Mr. George (as an attorney fee); and that

if Dr. Elbert Dean Elsea, now deceased, were available as a witness, he would support his contention that his health was diagnosed by the doctor as rendering it unwise for him to continue in the practice of medicine.

It should be noted that Dr. Elbert Dean Elsea died September 7 1967, Roland A. Bourdon died June 19, 1968; and Francis George died April 11, 1970.

The documents were filed June 4, 1965. The government then investigated the Offer for a time and on March 26, 1968 the defendants were informed that the government was considering bringing criminal charges based upon the Offer. Later the case was referred to the Department of Justice, and on May 20, 1970, the present indictment was returned.

The defendants say that the delay was unconscionable and that they have been irreparably prejudiced in the presentation of a defense, and that accordingly the indictment should be dismissed.

Generally, the Court of Appeals for the Sixth Circuit has held (see, Hoopengarner v. U.S., 270 F.2d 465, and cases in the Sixth Circuit following it) that the right to a speedy trial under the Fifth Amendment to the United States Constitution applies only after formal charges are lodged, and that the statute of limitations governs thereafter. We are satisfied, however, that pre-indictment delay, under the circumstances of this case, where there is a serious impairment of the accused's ability to present a defense, raises a constitutional issue under the Amendment. Our

own court has sustained a motion to dismiss under like circumstances. See U.S. v. Haulman, 288 F. Supp. 775 (1968). We are persuaded that that case was properly decided and that the grounds in support of the motion in this case are perhaps stronger, in terms of prejudice to the presentation of a defense, than in Haulman.

The motion to dismiss the indictment is granted.

IT IS SO ORDERED.

December 16, 1971. /s/ STEPHEN J. ROTH
United States
District Judge

APPENDIX F

United States District Court for the Eastern District of Michigan, Southern Division

Civil Action No: 76-40149

UNITED STATES OF AMERICA, Plaintiff,

v.

LAWRENCE M. and ROENA J. HOLLOWAY, Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment be entered for the plaintiff, United States of America, and this action is hereby dismissed.

Dated: January 11, 1985

ROBERT A. MOSSING, CLERK
By: /s/ Ruth A. Jozwiak,
Deputy Clerk

TO: Robert W. Haviland
AUSA
600 Church Street
Flint, MI 48502

Robert J. Solner
6735 Telegraph Road
Suite 100
Birmingham, MI 48080

APPENDIX G

Unites States Court of Appeals for the Sixth Circuit

NO. 85-1128

UNITED STATES OF AMERICA, Plaintiff/Appellee,

v.

LAWRENCE M. and ROENA J. HOLLOWAY, Defendants/Appellants.

ORDER

[Filed September 15, 1986]

BEFORE: LIVELY, Chief Judge; KENNEDY and MILBURN, Circuit Judges.

Upon receipt and consideration of the petition for rehearing filed herein by the defendants-appellants, the court concludes that it did not overlook or misperceive any of the issues raised in this appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk/AS

APPENDIX H

Form 656 Checklist
(Reference: IRM 57(10)2.1)

CHECKLIST FOR FORM 656

1. Is the taxpayer's full name, address, Social Security Number, and/or Employer's identification Number complete? 57(10)2.22

2. Is the offer dated in the space provided? 57(10)2.23

3. Is the liability being compromised accurately and completely described (not abbreviated) including the period of tax involved? 57(10)2.24

EXAMPLES

a. income tax, plus statutory additions, for the calendar year 1982.

b. Withholding and Federal Insurance Contributions Act taxes, plus statutory additions, for the quarters ending _____.

c. (Type of excise tax) plus statutory additions, for the period ending _____.

d. A 100 percent penalty assessment, plus statutory additions incurred as a responsible officer or employee of the XYZ Corporation for failure to pay withholding and Federal Insurance Contribution Act taxes for the quarterly periods ending _____ 12/31/xx, etc.

4. Is the amount offered entered in the space provided? 57(10)2.25

a. If the total offered is paid at the time the offer is filed, no

other entry is required.

b. If the offer is a deferred payment offer is the following information included in the terms of payment?

1. the amount deposited with the offer
2. the amount of each deferred payment
3. the date on which each payment is to be made.

5. Is the reason for submitting the offer stated in item 7 of Form 656? 57(10)2.27 (There are only two, doubt as to liability, and doubt as to collectibility.)
6. Is Form 433 attached for offers based on doubt as to collectibility?
7. Is the offer signed by taxpayer (Individual)? 57(10)2.28(1)

8. If a joint liability, is the offer signed by all parties to the assessment? (If not, must secure a co-obligator agreement) 57(10)5.3

9. If taxpayer is a corporation, is it signed in the corporation name by the president or other authorized officer? 57(10)2.28(1)

10. Has the waiver section on the offer been executed by a delegated Internal Revenue employee and the date inserted? 57(10)4

11. If a responsible officer of a corporation is filing the offer for the corporation and also is filing it in lieu of having the 100% penalty assessed against him/her, is the offer signed on behalf of the corporation by the responsible officer as well as individually by the respon-

sible officer. 57(10)9.741

Pattern Letter P-238

(Reference: IRM 57(10)(13).4:(2)(a))

REJECTION LETTER-OFFER TO COMPROMISE TAX AND 100 PERCENT PENALTY LIABILITIES

(Use appropriate letterhead)

[Salutation]

This refers to your offer of $[amount], submitted to compromise [kind of liability] for the tax period(s) year(s) or period(s) ending.

We are sorry, but your offer is rejected because the tax is held to be legally due and an amount larger than the offer appears to be collectible. We do not have authority to accept an offer in these circumstances.

We must therefore ask you to pay

your account in full as soon as possible. If you have any questions, please contact [name], Internal Revenue Service, [address, telephone number].

Sincerely, yours,

Signature and title

[When appropriate, substitute one of the following for the second paragraph:]

1. We are sorry, but your offer is rejected because you have not furnished sufficient information to enable us to determine its adequacy.
2. We are sorry, but your offer is rejected. Our action is based on what we consider to be the best interests of the Government.
3. Employment tax cases only. We are sorry, but your offer is rejected as insufficient since it is not our

policy to give favorable consideration to an offer to compromise employment taxes unless the amount offered is equal to the unpaid tax (exclusive of penalty and interest) and the taxpayer's financial condition indicates no greater amount is collectible. [This reason for rejection is applicable only when taxpayer submitting the offer is still in the same business, i.e., the same legal entity, as when the liability sought to be compromised was incurred.]

Pattern Letter P-679

(Reference: IRM 57(10)(13).42)

REJECTION LETTER-Pro Forma Rejection of Offer when the Taxpayer Dies During Consideration.

(Use appropriate letterhead)

[Salutation](See 1 and 2 below)

This refers to the offer submitting to compromise the [kind of liability] of [name of taxpayer(s)] for [year(s) or periods ending].

We are sorry, but we must reject this offer. It would not be legally acceptable as submitted because [name of deceased taxpayer] is now deceased.

In order for an offer on behalf of

this taxpayer to be considered a new Form 656 must be filed showing [name] as deceased.

If you have any questions, please contact [name], Internal Revenue Service, at address and telephone number.

Sincerely yours,

[Signature and title]

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1. [To The Estate of if a single taxpayer.]
2. [To the surviving spouse if a joint liability.]
